

FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

MAR 28 1994

**FILED**

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In Re Amendment of the Rules of  
Professional Conduct.  
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**PETITION OF THE LAWYERS  
PROFESSIONAL RESPONSIBILITY  
BOARD**

Petitioner, Lawyers Professional Responsibility Board (LPRB), respectfully petitions this Honorable Court to amend the Rules of Professional Conduct by adding a new Rule 1.8(k). In support of this petition, the LPRB would show the following:

1. Petitioner LPRB is a Board appointed by this Court to assist in the enforcement of the Rules of Professional Conduct and to oversee the lawyer discipline system.
2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05 (1992).
3. This Honorable Court has adopted the Rules of Professional Conduct effective September 1, 1985, as the standard of professional responsibility for lawyers admitted to practice in Minnesota.
4. In 1992 the LPRB Rules Committee considered the issue of consensual sex between attorneys and clients. The Committee was evenly divided as to whether existing Rule 1.7(b), MRPC, (conflict of interest) adequately addressed the issue or whether a new and explicit rule should be proposed.

5. In June 1993, the LPRB discussed a draft rule containing a *per se* prohibition against sex with current clients. The LPRB voted not to petition the Court at that time with the draft rule.

6. After consideration of several rules, the Minnesota State Bar Association (MSBA) on March 10, 1994, filed a petition for an amendment to the Rules of Professional Conduct by adding a new Rule 1.8(k). The LPRB commends the MSBA for its efforts in providing the impetus to develop a consensus concerning whether there should be an explicit rule governing the issue of sex with clients.

7. In March 1994, the LPRB reviewed and discussed the MSBA petition. The LPRB voted to request this Court to adopt a specific Rule of Professional Conduct governing sex with clients. The LPRB debated whether to join with the MSBA in its petition. After considering the proposed MSBA rule, the LPRB concluded the enforcement of the MSBA's proposal could potentially re-victimize the complaining client by focusing the disciplinary process upon the victim's financial or emotional vulnerability. Even if the MSBA's proposal included a presumption of vulnerability (in addition to the presumption that independent judgment is impaired), one of the bases for any lawyer's defense would be to rebut the presumption by attempting to prove the client was not emotionally or financially vulnerable. The LPRB seriously doubts that the public would benefit from a lawyer discipline proceeding which focuses upon the vulnerability of the complaining client.

8. The LPRB concluded that the *per se* rule proposed herein would best balance the concern of the bar for a bright line rule dealing with lawyer-client sexual relations with the public's concern that the complaining client not be further victimized by the disciplinary process. Any concern that the proposed *per se* rule is

overbroad is outweighed by the public interest in not creating a disciplinary standard which focuses on the victim instead of the lawyer's conduct.

9. The LPRB adopted with one change the *per se* prohibition approved by the MSBA Board of Governors and attached to the MSBA petition as Exhibit A (p. A-1). The LPRB proposed rule adds language to subsection (2) to clarify the application of the rule to in-house attorneys. The addition reflects (1) the difficulty of specifying by rule the fellow employees of an in-house attorney who should be considered a client for purposes of the rule, (2) the belief that personnel policies of large corporate and governmental entities provide some protection where in-house attorneys coerce or take personal advantage of the entity's employees, and (3) the view that Rule 1.7(b) addresses the situation where an in-house attorney's relationship with a fellow employee impairs the attorney's independent professional judgment.

10. The LPRB respectfully recommends and requests this Court to amend the Rules of Professional Conduct to add a new Rule 1.8(k) as follows:

**Rule 1.8 Conflict of Interest: Prohibited Transactions**

**Rule 1.8(k)** A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced or after it ended. For purposes of this paragraph:

- (1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.
- (2) If the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7(b) rather than by this rule with respect to sexual relations with other employees of the entity they represent.

- (3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.
- (4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

Based upon the foregoing, the Lawyers Professional Responsibility Board respectfully requests this Honorable Court to implement the rule proposed in paragraph 9 above.

Dated: March 28, 1994.

Respectfully submitted,

LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD  
520 Lafayette Road, Suite 100  
St. Paul, MN 55155-4196  
(612) 296-3952

By

Gregory M. Bistram  
GREGORY M. BISTRAM, CHAIR  
Attorney No. 8503

and

By

Marcia A. Johnson  
MARCIA A. JOHNSON  
DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY  
Attorney No. 182333  
520 Lafayette Road, Suite 100  
St. Paul, MN 55155-4196  
(612) 296-3952

OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY

DIRECTOR  
MARCIA A. JOHNSON  
FIRST ASSISTANT DIRECTOR  
KENNETH L. JORGENSEN  
ASSISTANT DIRECTORS  
CANDICE M. HOJAN  
MARTIN A. COLE  
BETTY M. SHAW  
PATRICK R. BURNS  
KAREN A. RISKU  
TIMOTHY M. BURKE  
HENRY C. GRANISON

520 LAFAYETTE ROAD  
SUITE 100  
ST. PAUL, MINNESOTA 55155-4196

TELEPHONE (612) 296-3952  
TOLL-FREE 1-800-657-3601  
FAX (612) 297-5801

March 28, 1994

OFFICE OF  
APPELLATE COURTS

MAR 28 1994

FILED

Mr. Frederick K. Grittner  
Office of Appellate Courts  
25 Constitution Avenue  
Room 245  
St. Paul, MN 55155

Re: Petition to Amend the Rules of Professional Conduct  
Supreme Court File No. C8-84-1650

Dear Mr. Grittner:

Enclosed for filing is the original and twelve copies of the Lawyers Professional Responsibility Board Petition to Amend the Rules of Professional Conduct, specifically to add Rule 1.8(k).

Very truly yours,

Office of Lawyers Professional  
Responsibility

By Betty Shaw  
Betty M. Shaw  
Senior Assistant Director

csk  
Enclosures

OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY

DIRECTOR  
MARCIA A. JOHNSON  
FIRST ASSISTANT DIRECTOR  
KENNETH L. JORGENSEN  
ASSISTANT DIRECTORS  
CANDICE M. HOJAN  
MARTIN A. COLE  
BETTY M. SHAW  
PATRICK R. BURNS  
KAREN A. RISKU  
TIMOTHY M. BURKE  
HENRY C. GRANISON

520 LAFAYETTE ROAD  
SUITE 100  
ST. PAUL, MINNESOTA 55155-4196

TELEPHONE (612) 296-3952  
TOLL-FREE 1-800-657-3601  
FAX (612) 297-5801

March 16, 1994

Honorable M. Jeanne Coyne  
Associate Justice  
Attn: Assistant Commissioner  
Supreme Court of Minnesota  
25 Constitution Avenue, Suite 430  
St. Paul, MN 55155

OFFICE OF  
APPELLATE COURTS

MAR 16 1994

FILED

Re: Amendment of the Rules of Professional Conduct  
File No. C8-84-1650

Dear Justice Coyne:

At the Lawyers Professional Responsibility Board meeting on March 11, 1994, the Board voted to submit an alternative to the MSBA proposed new Rule 1.8(k) regarding attorney-client sexual relations. The Board expects to be able to file a petition for rule change by March 28, 1994.

Very truly yours,

Marcia A. Johnson  
Director

tt  
cc: Fred Grittner ✓